Supreme Court, U.S.
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OFFICE OF THE CLERK

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY ADAMS; THOMAS J. BOGGS; BARRY L. CARMICAL; JOE COMBS; GLENN W. CORNETT; MIKE CREECH; RONNIE W. DUDASH; ROGER E. ELLIS; CLIFTON D. FOX; DONALD MASSEY, SR.; JACQUALINE D. MCINTOSH; WILLIAM M. MILLER; DENVER W. POWERS; FRANCIS SEXTON; THOMAS SOLTESS; JAMES C. STEPHENS; MURL THOMAS; ROSCOE YOUNG;
PETITIONERS

v.

APOGEE COAL COMPANY; ARCH COAL INC.; BITUMINOUS COAL OPERATORS ASSOCIATION; UNITED MINE WORKERS OF AMERICA;
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORI

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QUESTIONS PRESENTED FOR REVIEW

This matter was originally filed by the Petitioners in the Harlan Circuit Court, Harlan County, Kentucky, alleging only state law causes of action. The Respondents subsequently removed this matter to the United States District Court for the Eastern District of Kentucky, London Division, based on federal question jurisdiction, 28 U.S.C. §1331, and §1441.

The sole question presented for review is whether or not the District Court properly exercised federal question jurisdiction in this matter, or should the District Court have remanded this case back to the Harlan Circuit Court.

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The January 27, 2004, Order Affirming of the United States Court of Appeals for the Sixth Circuit, Case No. 03-5443, which was unpublished, and is reprinted in Appendix 1.

The February 13, 2003, Memorandum Opinion & Order of the United States District Court for the Eastern District of Kentucky, London Division, Case No. 02-537-JMH, which was unpublished, and is reprinted in Appendix 2. The United States District Court for the Eastern District of Kentucky, London Division's Judgment, Memorandum Opinion & Order, entered December 26, 2002, which was unpublished, and is reprinted in Appendix 3.

STATEMENT OF JURISDICTION

The basis of the Supreme Court's Jurisdiction is 28 USC §1254(1).

STATUTES INVOLVED

1. 28 U.S.C. §1331 - Federal question

   The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. 28 U.S.C. §1441 - Actions Removable Generally
   (In Pertinent Part)

   (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have

original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

3. §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185 - Suits by and against labor organizations (In Pertinent Part)

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

4. Employment Retirement Income Security Act

STATEMENT OF THE CASE

This matter arises out of fraudulent misrepresentations made to the Petitioners (hereinafter "Miners") in regards to their voting to ratify the National Bituminous Coal Wage Agreement

(hereinafter "NBCWA") of 1998, between the Respondent, United Mine Workers of America (hereinafter "UMWA"), and the Respondent, Bituminous Coal Operators Association (hereinafter "BCOA").

The Miners were all employees of Respondents', Apogee Coal Company, Inc., d/b/a Arch of Kentucky, Arch Coal, Inc. (hereinafter "Arch"), and members of the UMWA, when they were laid off on September 10, 1997. At the time the Miners were laid off, each had twenty (20) or more years of signatory service. Another group of coal miners were laid off on December 13, 1997; this group also contained miners with twenty (20) or more years of signatory service.

Each of the Miners were sent letters from the UMWA encouraging them to vote to ratify the NBCWA, and making the representation that if the NBCWA was ratified they would come under the new "20 and out" provision, allowing them to obtain their retirement. (Letter, Appendix) The Miners did in fact vote to ratify the NBCWA, but due to failure to recall the Miners, they were not covered by the NBCWA. The members of the December lay off group with twenty (20) or more years of service were extended the option of returning to work for four (4) hours, following the ratification of the NBCWA, so as to allow them to be covered by the NBCWA (Letter 2, Appendix) The Miners were not extended this option.

The "20 and out" provision allowed miners with twenty (20) or more years of signatory service to retire, no matter their age. Prior to the adoption of the NBCWA, a miner had to be fifty-five (55) years of age, with twenty (20) or more years of service to retire. Due to the failure to recall the Miners, they did not come under the NBCWA, therefore, they were denied their retirement, as they were not covered under the new "20 and out" provision.

The Miners filed the instant action in the Harlan Circuit Court, Harlan County, Kentucky, alleging only state law claims. The Respondents removed this matter to the United States District Court for the Eastern District of Kentucky, London Division, and then each filed a Motion to Dismiss. The Miners responded with an Objection to Removal, and sought remand to the Harlan Circuit Court. The District Court granted Respondents' Motions to Dismiss, and the Miners then filed a Motion to Alter, Amend or Vacate. The Motion to Alter, Amend or Vacate was denied. The Miners then timely filed their Notice of Appeal to the Sixth Circuit Court of Appeals. The decision of the District Court was affirmed by Order entered January 27, 2004. The Miners now Petition this Honorable Court for a Writ of Certiori.

The District Court exercised federal question jurisdiction. 28 U.S.C. §§1331, and 1441.

ARGUMENT

The Petitioners move this Honorable Court to exercise their judicial discretion, and grant Petitioners' Writ of Certiori, pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States, as the United States Court of Appeals, for the Sixth Circuit, by affirming the removal of the instant case from the Harlan Circuit Court to the United States District Court, Eastern District of Kentucky, London Division, has sanctioned such a departure by the U.S. District Court, as to call for an exercise of this Court's supervisory power.

This matter was wrongfully removed to federal court based on the doctrine of complete preemption. The complaint contains only state law claims, none of which are preempted; therefore, the District Court was without jurisdiction to hear the matter. The law of the Commonwealth of Kentucky should have been applied, as the Miners' claims are not preempted by

either the Labor Management Relations Act of 1947 or ERISA, as alleged by the Respondents. The Miners have clearly stated a claim under Kentucky law; therefore, the District Court was without jurisdiction, and the case should have been remanded to the Harlan Circuit Court.

I. Miners' Claims Are Not Preempted by §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185.

The Miners' claims are not preempted by §301 of the Labor M anagement Relations Act of 1947, 29 U.S.C. §185 (hereinafter "Section 301"), as they are based completely on state law. The Petitioners' cite to the case of *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987), which held that absent a claim founded directly on rights created by a collective bargaining agreement, or a claim that is substantially dependent on the analysis or interpretation of a collective bargaining agreement, Section 301 does not preempt state law claims. The claims set forth in the Miners' Complaint are not founded on rights created in the NBCWA, nor are the claims substantially dependent on the analysis or interpretation of the NBCWA; therefore, the claims are not preempted.

The *Caterpillar* Court was faced with the issue of whether or not claims based on individual employment contracts were preempted by Section 301. *Id.* at 388. This Court held that they were not, and ordered the case remanded to state court, as removal was improper. *Id.* The Court found it telling that:

> ". . . Section 301 says nothing about the content or validity of individual employment contracts. It is true that respondents, bargaining unit members at the time of the plant closing,

> possessed substantial rights under the collective agreement, and could have brought suit under §301. As masters of the complaint, however, they chose not to do so. . . respondents' complaint is not substantially dependent upon interpretation of the collective-bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement. As the Court has stated, 'it would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.'" Citing, *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985).

This same analysis should be applied to the instant case. The Miners did not have any rights under the NBCWA, as they were never employed under that collective agreement, making it impossible for their claims to be based on said agreement. Furthermore, the claims made by the Miners do not rely on the NBCWA. The NBCWA is clear, if the Miners had worked under the agreement they would have been part of the "20 and out" provision and entitled to their retirement. The Miners' cause of action arose out of the fraudulent misrepresentations inducing them to vote in favor of the NBCWA, and Arch's subsequent failure to recall them as they did the members of the December lay off group. The NBCWA simply plays no role in the determination of the Miners' claims. The only reference to the NBCWA is that the Miners were induced to sign it, and if they had been recalled, they would have been eligible for retirement.

This Court again visited the issue in the case of *Lingle*

v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), this time in regards to a state law claim for retaliatory discharge. The Court found the questions involved in the case to be "purely factual" pertaining only "to the conduct of the employee and the conduct and motivation of the employer" neither of which, "requires a court to interpret any term of a collective-bargaining agreement." *Id.* at 419. The state law claim was said to be completely "independent" of the agreement, meaning, "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* at 420. The Sixth Circuit has adopted the reasoning of *Lingle* and applied it to bar Section 301 removal of state law claims. See, *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir. 1989), *O'Shea v. The Detroit News*, 887 F.2d 683 (6th Cir. 1989), and *McKenzie v. Ford Motor Co.*, 1994 U.S.Dist.LEXIS 18734 (E.D.Mich. 1994). Again, this analysis can be applied to the case at bar. The Miners' claims are entirely independent of the collective-bargaining agreement, and resolution of the claims do not require the construction or interpretation of the NBCWA.

The analysis and policy expressed in both *Caterpillar* and *Lingle* have been applied repeatedly, both before and after those decisions, and the same should be done in this case. See, *Roy v. Ford Motor Co.*, 748 F.Supp. 492 (E.D.Mich. 1990)(Holding individual employment contracts not preempted by Section 301, as they did not depend on interpretation of collective-bargaining agreement); *Akerman v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 1973 U.S.Dist. LEXIS 15304 (N.D.Ohio 1973)(Holding that Section 301 did not confer jurisdiction on federal courts to adjudicate individual rights of employee/union members); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989)(Section 301 is not implicated unless resolution of the state claim requires interpretation of a collective bargaining agreement); *Berda v. Berda*, 881F.2d 20

(3rd Cir. 1989)(Contract and tort claims for monetary relief not preempted by Section 301); *Giba v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 205 F.Supp. 553 (U.S.Dist.Ct.Conn. 1962)(Whether breach of contract, breach of trust, third-party beneficiary or whatever, as the source of plaintiffs' rights, none is federally created; all are ancient common law).

It should also be noted that finding state law applicable in this case will not frustrate or interfere with the congressional goals of Section 301 to have uniform interpretation of labor contract terms. See, *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962). This analysis of *Caterpillar* and *Lingle* should have been applied to the case at bar in finding that the Miners' claims are not preempted by Section 301, they are not dependent upon the NBCWA, nor do they require the interpretation of NBCWA. The Sixth Circuit, sanctioned the District Court's departure from this analysis, and the Writ of Certiori should be granted.

II. Miners' Claims Are Not Preempted by ERISA.

Miners' claims are not to recover benefits due them under the terms of the NBCWA, to enforce rights under the terms of the plan, or to clarify any rights under the terms of the plan; therefore, said claims are not preempted by ERISA. The Sixth Circuit has provided guidance in determining if a state law claim is preempted by ERISA, and states a federal cause of action:

> "In order to come within the [complete preemption] exception a court must conclude that the common law or statutory claim *under state law should be characterized as a superseding ERISA action* 'to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or

> to clarify his rights to future benefits under the terms of the plan,' as provided in § 1132(a)(1)(B)." *Agnifili v. KFC Corp.*, 924 F.Supp. 78 (W.D.Ky. 1996); citing, *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir. 1995).

Applying this analysis to the case at bar, it is clear that the Miners' claims are not preempted by ERISA. The Miners' have admitted that they do not come under the NBCWS, nor do they claim that they are entitled to benefits from the NBCWA; rather, the Miners' are seeking monetary damages from the Respondents themselves due to the fraudulent inducements made, and the subsequent refusal to rehire. This is precisely what was sought in *Agnifili*, where the Court held:

> "Plaintiff seeks to collect her damages not from any ERISA plan or administrator, but from the corporate defendant itself Plaintiff seeks damages which are computed in part by reference to an employee benefit plan. However, she does not seek to *enforce* rights, *recover* benefits or *clarify* rights under the authority of the plan. She invokes ERISA benefits merely as a measure of damages. Under these circumstances, such a claim is insufficient to establish an action under § 1132(a)(1)(B)." *Agnifili*, at 81.

This is the same situation as in the instant case, and the District Court should have applied the same rule. The Miners' only reference to the NBCWA is to measure damages, they are not seeking to enforce, recover or clarify any rights or benefits from the NBCWA. Therefore, ERISA preemption is not present, and state law is applicable. The Sixth Circuit should have directed the District Court to remand the case.

III. The Miners are Masters of the Complaint, All Doubt is to be Cast Against Removal, and the Removing Party Bears the Burden of Showing Removal is Proper.

The District Court failed to take cognizance of the fact that the plaintiff is the master of the complaint, and the Court of Appeals for the Sixth Circuit sanctioned said failure:

> "the presence of a federal question, even a §301 question, in a defensive argument does not over come the paramount policies embodied in the well-pleaded complaint rule - - that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Caterpillar, supra*, 398-399 (Emphasis in original).

In the instant action, there is no federal question on the face of the complaint, the Miners chose to eschew federal claims and have the case heard in state court, and they have an absolute right to do so. The Miners did not invoke any rights created by a collective bargaining agreement; rather, the

Respondents have injected a federal question into the complaint in their attempt to have this matter heard in federal court. This is inappropriate, the Respondents cannot be allowed to choose the forum for litigation, "If a defendant could do so the plaintiff would be master of nothing." *Id.* Therefore, in the case at bar, by this rule alone it should have been evident to the Court that removal was improper.

The Court of Appeals and District Court also ignored applicable law stating that all doubts are to be cast against removal. *Messick v. Toyota Motor Mfg.*, 45 F.Supp.2d 578 (E.D.Ky. 1999); *citing, Her Majesty the Queen v. City of Detroit,* 874 F.2d 332 (6th Cir. 1989). The District Court simply made no mention of this presumption in its opinion, nor did it mention the burden of the Respondents in this matter: The Respondents, as the removing party, had the burden of showing that removal is proper. *Id.* at 580; *citing, Ahearn v. Charter Township of Bloomfield,* 100 F.3d 451 (6th Cir. 1996). This activity was sanctioned by the Sixth Circuit's affirming of the District Court's decision.

Neither of the three Respondents provided any support for removal when they removed this case to federal court, nor did they provide any support in their motions to dismiss. Furthermore, the District Court placed the burden on the Miners to show why removal is improper, a clear error of law, again affirmed by the Sixth Circuit. Neither the District Court, nor the Court of Appeals made any mention of the burden the Respondents were to bear or what they did to meet that burden.

IV. The Miners Have Alleged Facts Sufficient to Support Numerous Claims Arising Under Kentucky Common Law.

In their Complaint, the Miners alleged sufficient facts to support several state law claims. As masters of the complaint,

the Miners had the ability to proceed under any cause of action in any court. *See, Caterpillar, supra.* Furthermore, a Plaintiff need not prove every aspect or element of his claim, as stated by the Kentucky high court in *Folks v. Bell*, 462 S.W.2d 895 (1971):

> "It is not necessary to state a comprehensive 'cause of action'. *** The true objective of a pleading stating a claim *is to give the opposing party fair notice of the essential nature, the basis of the claimant's right, the adverse party's wrong, and the type of relief to which the claimant deems himself entitled.*" *Citing*, Kentucky Practice, Rules of Civil Procedure Annotated, Clay, Author's Comment 3, CR 8.01. (Emphasis in original).

The Miners would put forth to this Court that sufficient facts were pled in the complaint to support various causes of action arising under Kentucky law, and to give the Respondents fair notice as to the essential nature and the basis of the Miners' rights, the Respondents' wrongs, and the requested relief.

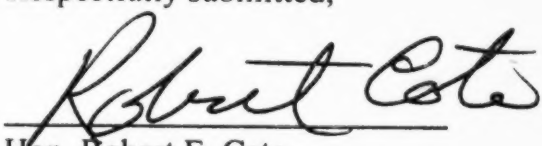
The Miners would submit that three separate claims under the laws of the Commonwealth of Kentucy can be adequately supported by the facts alleged in their complaint: (1) the common law tort of outrage; (2) the tort of fraud; and (3) a breach of contract claim.

CONCLUSION

Due to the foregoing reasons, this Court should grant the Petitioners' Writ of Certiori. This matter was improperly removed from the Harlan Circuit Court, to the United States District Court. The Petitioners are masters of the complaint, and alleged only state law causes of action, none of which rely

on or are dependent upon the LMRA or ERISA. The Respondents have never produced evidence to warrant removal. The Sixth Circuit Court of Appeals sanctioned the erroneous findings of the District Court in affirming the District Court's decision, thereby warranting this Honorable Court's review.

Respectfully submitted,



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APPENDIX

1. Order of the United States Court of Appeals for the Sixth Circuit, January 27, 2004.

2. Memorandum Opinion & Order of the United States District Court for the Eastern District of Kentucky, London Division, February 13, 2003.

3. Judgment, Memorandum Opinion & Order, of the United States District Court for the Eastern District of Kentucky, London Division, December 26, 2002.

4. Letter from the United Mine Workers of America to its members, December 10, 1997.

5. Letter from Arch of Kentucky to Mr. Terry W. King, January 2, 1998.

1. United States Court of Appeals for the Sixth Circuit
Gregory Adams, et al. v. Apogee Coal Company, et al.
No. 03-5443, Order Entered January 27, 2004
Before: Nelson, Gilman, and Rogers, Circuit Judges

These eighteen former coal miners appeal through counsel a district court order dismissing their complaint that purported to raise a state tort claim of outrage, but was removed to federal court as preempted by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. §185, and the Employee Retirement Income Security Act (ERISA), and ultimately dismissed for failure to state a claim. Defendants have waived oral argument, and plaintiffs' counsel failed to respond to the court's request to show cause why oral argument would be necessary. This panel unanimously agrees that oral argument is not needed in this case. Fed. R. App. P. 34(a).

Plaintiffs filed their complaint in Kentucky circuit court. They alleged that they had been laid off in September 1997, with over twenty years of employment in coal mining, but were not eligible for early retirement because they were less than fifty-five years old. In December 1997, the United Mine Workers of America (the union) negotiated a new collective bargaining agreement which would allow miners laid off in the future to obtain early retirement where they had twenty years of employment, regardless of their age. The union sent a letter to its members urging them to vote for the new agreement. Plaintiffs alleged that the letter represented that they would be eligible for early retirement if the agreement were ratified. A group of miners with at least twenty years of seniority but younger than fifty-five was also laid off in December, after the agreement had been reached but before its effective date of January 1, 1998. Those miners were temporarily recalled in 1998 and then laid off so that they could take early retirement.

No such opportunity was given to plaintiffs. Plaintiffs alleged that defendants' conduct as described above stated a claim of outrage.

Defendants removed the complaint to the district court. Plaintiffs did not move for a remand, but in responding to the defendants' subsequent motions to dismiss the complaint for failure to state a claim, argued that the complaint should be remanded. The district court found that the complaint was properly removed as preempted by th LMRA and ERISA, and dismissed it for failure to state a claim under those statutes. The court held in addition that the LMRA claim would be barred by the statute of limitations and for failure to exhaust administrative remedies. Plaintiffs' motion for reconsideration was subsequently denied. In responding to the motions to dismiss and in moving for reconsideration, plaintiffs also argued that they had asserted state-law torts of fraud and breach of contract, but they never moved to amend their complaint to assert such claims. In any event, those alleged claims would be subject to the same analysis as the outrage claim that was asserted.

On appeal, plaintiffs do not take issue with the district court's ruling that the complaint did not state a claim under the LMRA or ERISA. However, they argue that the complaint should have been remanded to the state circuit court.

The standard of review of a removal decision is de novo. *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 465 (6th Cir. 2002). Plaintiffs argue that, under the well-pleaded complaint rule, they are the masters of the complaint and can avoid removal by opting to assert only a state-law claim. This argument overlooks the Supreme Court's holding that the well-pleaded complaint rule is inapplicable in cases where the claims asserted are completely preempted, such as claims arising under the

LMRA and ERISA. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-67 (1987).

The district court properly concluded that the complaint in this case essentially raised a claim that the union had failed to represent plaintiffs fairly when it allegedly misled them to believe that they would be eligible for early retirement if the 1998 collective bargaining agreement were ratified. When a plaintiff invokes a right created by a collective bargaining agreement, he has chosen to plead a federal claim under the LMRA, and the defendants may opt to remove the case to federal court. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 399 (1987). This court has also held that a fraud claim was preempted by the LMRA where the collective bargaining agreement created the right claimed by the plaintiff. *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1038 (6th Cir. 1999)(claims of breach of fiduciary duty); *Tassinare v. American Nat'l Ins. Co.*, 32 F.3d 220, 224-25 (6th Cir. 1994)(intentional infliction of emotional distress claim arising out of failure to make contributions to retirement benefit plan preempted).

Because the complaint was properly removed as completely preempted by the LMRA and ERISA, and plaintiffs do not contest the district court's conclusion that they failed to state a claim under either of those statutes, the district court's order is affirmed.

ENTERED BY ORDER OF THE COURT

s/Clerk

2. United States District Court for the Eastern District of Kentucky, London Division, No. 02-537-JMH
Gregory Adams, et al. v. Apogee Coal Company, et al.
Memorandum Opinion & Order, Entered February 13, 2003.

This matter is before the Court on plaintiffs' motion to alter, amend, or vacate [Record No. 23]. Fully briefed, plaintiffs' motion is ripe for review.

The purpose of a Fed. R. Civ. P. 59(a) motion is to enable a Court to correct manifest errors of law or fact or to consider the importance of newly discovered evidence. *See Helton v. ACS Group*, 964 F.Supp. 1175, 1182 (W.D.Ky. 1997). A party should not file such a motion for the purpose of relitigating issues already presented before the Court. *See Id.* at 1182. The law is clear that Fed. R. Civ. P. 59 is not intended to allow a party to "rehash" old arguments. *Id.* The Court will grant relief for such motions under the following circumstances: "(1) An intervening change of controlling law; (2) Evidence not previously available has become available; or (3) It is necessary to correct a clear error of law or prevent manifest injustice." *Id.*

Plaintiffs' motion to alter, amend, or vacate argues that, in finding that federal law preempted plaintiffs' asserted state law "outrage" cause of action and in dismissing the case on the merits, the Court committed clear error of law. Plaintiffs also attempt to assert ne claims; this, however, is inappropriate for a motion for reconsideration.

The Court previously found that plaintiffs' claims - however defined - were preempted by the Employee Retirement Income Security Act of 1974 and the Labor Management Relations Act of 1947. While it is true that generally a plaintiff is "master of his complaint," this is simply not the case in

instances where, as here, federal law is found to be completely preemptive. In such cases as these, any cause of action is federal.

Accordingly,

IT IS ORDERED that plaintiffs' motion to alter, amend, or vacate [Record No. 23] be, and the same hereby is, **GRANTED**.

This the 13th day of February, 2003.

/s/ Joseph M. Hood, Judge

3. United States District Court for the Eastern District of Kentucky, London Division, No. 02-537-JMH Gregory Adams, et al. v. Apogee Coal Company, et al. Judgment, Memorandum Opinion & Order, entered December 26, 2002.

JUDGMENT

In accordance with the Memorandum Opinion and Order of even date and entered contemporaneously herewith,

IT IS HEREBY ORDERED:

(1) That this action be, and the same hereby is, **DISMISSED;**

(2) That all pending motions be, and the same hereby are, **DENIED AS MOOT;** and

(3) That this action be, and the same hereby is **STRICKEN FROM THE ACTIVE DOCKET.**

This the 26th day of December, 2002.

/s/ Joseph M. Hood, Judge

MEMORANDUM OPINION & ORDER

This matter is before the Court on defendants' separate motions to dismiss [Records Nos. 4, 6, & 11]. Fully briefed, defendants' motions are ripe for review.

I. INTRODUCTION

The instant action is, at is core, a labor dispute. The following are the facts, as alleged by plaintiff.

Plaintiffs are a group of veteran coal-miners who have earned, individually, at least twenty (20) years of signatory service with Apogee Coal Company ("Apogee"), a subsidiary of Arch Coal, Inc. ("Arch"), as defined under the National Bituminous Coal Wage Agreement ("NBCWA") of 1988. The NBCWA is an agreement between the United Mine Workers of America ("UMWA" or "union"), a labor organization to which plaintiffs belong, and the Bituminous Coal Operators Association ("BCOA"). The NBCWA governs the employment relationship between plaintiffs an Apogee, and plaintiffs are all either "plan participants or beneficiaries of the defined pension plan, NBCWA, between the UMWA and the BCOA." [Complaint, ¶ 8].

Plaintiffs complaint alleges that on or about September 10, 1997, a large number of coal miners were laid off by defendant Apogee Coal Company. Many of those laid off had twenty (20) or more years of signatory service with Apogee. Subsequently, on or about December 10, 1997, the UMWA reached a tentative agreement with the BCOA with respect to a new collective bargaining agreement for 1998. Unlike the 1997 agreement, the 1998 agreement contained a "20 and out" provision, a clause providing that all miners with twenty (20) or more years of service who are laid off are permitted to retire -

irrespective of how old they are. This new "20 and out" provision was a significant and marked departure from the 1997 agreement, which required for retirement (with full benefits) twenty-years service *plus* attainment of the age of fifty-five (55) On December 10, 1997, defendant UMWA sent a letter to its members (including plaintiffs) stating that the union had "negotiated an historic 20-and-out pension benefit for miners who may be laid off in the future, along with the largest pension increases in the history of the UMWA." The letter urged the union members (including plaintiffs) to vote in favor of the new agreement.

On or about December 13, 1997, Apogee laid off a second group of miners. Many of these, too, had twenty (20) or more years of signatory service with the company.

On or about December 16, 1997, the UMWA voted to ratify the NBCWA between the UMWA and the BCOA. The new NBCWA - the one that contained the new "20 and out" provision - went into effect on January 1, 1998.

On or about January 2, 1998, Apogee sent Conditional Recall Notices to those miners laid-off in December who had twenty (20) years service with the company. The recipients were instructed to report for work on January 7, 1998, at noon; they would work four (4) hours and would then be placed back on lay-off status the same day. By "working" after January 1, 1998, of course, this group of miners became eligible for the "20 and out" provision under the new NBCWA. Plaintiffs, consisting of the group of miners laid off in September, were not afforded this option. Because they were not hired and subsequently laid-off under the new NBCWA (as were the December layoffs), plaintiffs (the September layoffs) could not take advantage of the "20 and out" provision.

The aforementioned is undisputed. What *is* disputed are plaintiffs' allegations - contained in paragraphs 18-21 of their complaint - that defendants were "plan administrators" (presumably of the pension plan to which plaintiffs seek access), that as "plan administrators" defendants "stood in a fiduciary relationship with the plaintiffs" and "owed a duty of good faith, fair dealing and . . . honesty," and that defendants breached the "fiduciary duty" owed plaintiffs by "represent[ing] to the plaintiffs that a vote in favor of the NBCWA would allow the plaintiffs to actively participate in the '20 and out' provision of the agreement." [Complaint, ¶¶ 18-21].

Plaintiff goes on to transform the above allegation into a single asserted claim - one for the Kentucky common law tort of "outrage." Plaintiffs' is a one-count complaint.

II. STANDARD OF REVIEW

In the Sixth Circuit, the standard applicable to motions to dismiss is well-established. In *Persian Galleries, Inc. v. Transcontinental Ins. Co.*, 38 F.3d 253, 258 (6th Cir. 1994), the Court of Appeals held that "[a] district court's grant of a motion to dismiss is proper when there is not set of facts that would allow the plaintiff to recover. All factual allegations are deemed true and any ambiguities must be resolved in plaintiff's favor." *Id.* While this standard of review is liberal, the plaintiff is required to put more than the bare assertion of legal conclusions. "In practice, a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993)(quoting *Scheid v. Fanny Farmer Candy Shops*, 859 F.2d 434, 436 (6th Cir. 1988)).

III. ANALYSIS

The court addresses, as an initial matter, the question of subject matter jurisdiction. Defendants, asserting that plaintiffs' claim is preempted by § 310 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("LMRA") and by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, predicate jurisdiction on the basis of a federal question. Plaintiffs counter that their claim is a state-law, common-law claim, and that therefore removal to this Court was improper.

Upon close inspection, plaintiffs' specific allegations reveal their true colors. Though plaintiffs allegations are abstruse and convoluted, the Court's best efforts at a liberal construction surface two distinct causes-of-action, both federal. To the extent plaintiffs have pled anything at all, they have pled 1) a claim under ERISA against defendants for breach of duties relating to their status as "plan administrators," and 2) a claim against the union itself for unfair representation. ERISA is preemptive of plaintiffs' first claim, the LMRA of the second. Consequently, federal jurisdiction lies.

As for the ERISA claim, the most obvious problem is that the complaint does not identify who, precisely, administers the pension plan. (The parties' briefs suggest that the plan is run by Trustees of the UNWA 1974 Pension Plan and Trust.) Because plaintiffs' ERISA claim turns on purported breaches of alleged fiduciary duties, this would appear to be a serious omission. Under ERISA, a fiduciary is defined as someone who exercises discretionary control over plan management and administration. 29 U.S.C. § 1002 (21) (A). Case law makes clear that "[t]he administrative discretion to grant or deny claims is the crucial factor that makes an entity a fiduciary within the terms of ERISA." *Voyk v. Brotherhood of Locomotive Engineers,* 198 F.3d 599, 604 (6th Cir. 1999). Plaintiffs, however, do not allege that any of the defendants

have such discretion. Because a fiduciary relationship is a prerequisite, it is insufficient simply to assert the label.

Even assuming that defendants owed plaintiffs some sort of fiduciary duty, plaintiffs' ERISA claim still fails for another reason: the complaint is totally devoid of any allegation that defendants made any affirmative representation to plaintiffs at all. Any such representation - even if read into the complaint- is certainly not identified. The only representation specifically referenced is that made by the UMWA in its letter to plaintiffs (in which the UMWA urged plaintiffs to vote for the new collective bargaining agreement). Such representation, however, cannot be charged to Apogee or the BCOA.

As for plaintiffs' "unfair representation" claim under the LMRA, here too plaintiff's complaint is unclear. The essence of plaintiffs' allegation is this respect is that in advocating for ratification of the new collective bargaining agreement the UMWA misrepresented the nature of the new agreement. Here, too, however, plaintiffs' complaint gives no indication as to how, specifically, they were misled. The only representation cited is that made in the UMWA's letter to the membership; the letter, however, makes clear that the new "20 and out" provision applies only to those "laid off in the future." Given that the letter is unambiguous, and that plaintiffs do not point to any additional representations, the Court cannot perceive the foundation for plaintiffs' claim that they were misled. What's more, even if plaintiffs complaint *can* be construed to assert a substantive claim under the LMRA, such a claim could would face a procedural bar: plaintiffs failed to exhaust their administrative remedies via the collective bargaining grievance procedures. Also, given that plaintiffs waited more than six months to file suit, it would seem that plaintiffs's LMRA claim is barred by the applicable statute of limitations.

All in all, plaintiffs' complaint presents the Court with the difficult task of de-coding a loose-knit panoply of factual allegations. Though plaintiffs attempt to style their claim as one for "outrage" under the Kentucky common law, it is beyond cavil that in considering a complaint substance - and not form - governs. Looking to the substance of plaintiffs' complaint, the Court's best efforts at a liberal construction surface two distinct claims: one claim versus Arch/Apogee/BCOA under ERISA, and one claim for "unfair representation" versus the UMWA. For the reasons outlined above, both claims fail as a matter of law.

Accordingly,

IT IS ORDERED that defendants' motions to dismiss [Record Nos. 4, 6, & 11] be, and the same hereby are **GRANTED.**

This the 26th day of December, 2002.

/s/ Joseph M. Hood, Judge

4. Letter from the United Mine Workers of America to its members, December 10, 1997.

Dear Brothers and Sisters:

We are writing to inform you that the UMWA has reached a tentative agreement with the BCOA on the National Bituminous Coal Wage Agreement (NBCWA) of 1998. There are significant improvements in wages, pensions and other benefits, and no concessions. *Most importantly, we have negotiated an historic 20-and-out pension benefit for miners who may be laid off in the future, along with the largest pension increases in the history of the UMWA.* For the vast majority of our members, this provision means that you will be assured of either having a good-paying job to support your family, or the ability to retire regardless of your age should you be laid off.

As you can see in the attached summary, there are significant improvements for both active and retired members. We also believe that the timing is right for concluding a successor agreement. The coal industry is under assault–climate change, acid rain, EPA regulations and utility deregulation all will affect our employment opportunities in the future. In addition, about half of al local supply agreements with electric utilities will expire in the next few years. Given these circumstances, we believe that it is in the interests of all UMWA members to ratify an agreement now, rather than wait until next year.

You will be asked to vote on the new agreement in a few days. We wanted to provide the background of these negotiations and some of the important highlights from the new agreement. You will receive complete explanation at your local union meeting.

As you know, the Union exercised its right to reopen the 1993 NBCWA last August. At that time we negotiated pension improvements for active miners and pension bonuses for our retirees. We also negotiated wage bonuses for all active miners and pension bonuses for our retirees. We also negotiated wage bonuses for all active miners. The second of the $600 wage bonuses and the retirees' bonuses are payable December 16, 1997. Perhaps most significantly, we resolved the deferred vested pension problem for any miner with 20 years who worked under the 1993 NBCWA, providing significant pension income protection for them should they be laid off. We also agreed that we would begin negotiations for a successor agreement no later than August of this year.

This spring we held a series of regional conferences for local unions at which there was substantial discussion of the state of the U.S. coal industry and the importance of securing an early agreement that met the needs of both active and retired miners. We also spent a considerable amount of time in the last two years visiting local unions halls, bath houses and mine sites to hear directly from the rank and file their expectations and desires for the contract.

We heard clearly that the number one priority of our members is improvements in the pension plan. The average working miner is 48 years old, and knows the assaults the coal industry is under. Many of you told us you were concerned whether your mine would be working until you reached retirement age. You told us you wanted more pension income when you retire, and that we should never forget our retired brothers and sisters.

We are submitting this tentative agreement to you for ratification because we believe that we have met the goals of the membership. There are gains in every area of the contact,

with no concessions. Wages, pensions, life insurance, death benefits, vision and dental care, sickness and accident benefits have all been improved. There is something for all working and retired members in this agreement, *and no concessions*. Your line officers believe this tentative agreement is in the best interests of the membership of the UMWA, and deserves to be ratified.

Of course, the ultimate decision on ratification rests with you and your UMWA brothers and sisters. We trust your wisdom and judgment without question, just as you have trusted us. We urge you to attend the explanation meeting at your local union, consider the contract carefully, and vote in the interests of your family and your Union.

We want to thank you for the support and solidarity you have shown since we took office two years ago. The contract improvements we have achieved in last year's reopener and this year's tentative agreement–with no need to engage in a strike–are a testament to your strength and determination. Solidarity forever, for the Union makes us strong.

We wish you a safe and happy holiday season.

In solidarity,

/s/Cecil E. Roberts
/s/Jerry D. Jones
/s/Carlo Tarley

5. Letter from Arch of Kentucky to Mr. Terry W. King, January 2, 1998.

Mr. Terry W. King
Box 235
Cumberland, KY 40823

Conditional Recall Notice and Agreement

Apogee Coal Company ("the Company") and the International Union, United Mine Workers of America ("Union") have agreed to offer you an opportunity to participate in a conditional recall. In order to be eligible to participate in the recall, you must verify that you understand the terms of the conditional recall and that you accept such terms by signing this agreement and returning it to the Company, as described below.

Participation in this conditional recall is voluntary. If you elect not to participate, your panel rights under the National Bituminous Coal Wage Agreement of 1998 ("1998 NBCWA") will not be affected in any way.

If you elect to participate, the Company will recall you for work, subject to the limitations set forth below, on Wednesday, January 7, 1998. If you accept this conditional recall, you must report to the mine office at 12:00 noon, Wednesday, January 7, 1998. If you report, you will be paid four (4) hours reporting pay, based on the hourly rate for your most recent job classification. You will be placed back on lay-off status effective January 7, 1998.

In order to participate in this conditional recall, you must agree to the following:

I fully understand that by electing to participate in the

conditional recall, the only contractual benefit under the 1998 NBCWA I am entitled to receive is four (4) hours pay. I understand and acknowledge that I am not entitled to and will not receive any other contractual benefit, including, but not limited to, graduated vacation, floating vacation, regular vacation, sick days, holiday pay, clothing allowance, and any and all other benefits.

In order to participate in this conditional recall, you must sign this agreement and return it to the Company when you report for work at 12:00 noon on January 7, 1998.

AGREED:

BY: /s/ Terry W. King
SSN:xxx-xx-8287
Date:1-7-98